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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

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OCTOBER TERM 1976
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PUYALLUP TRIBE, INC., and RAMONA BENNETT, Petitioners,

v.

THE DEPARTMENT OF GAME, et al., Respondents.

PETITION FOR A WRIT
OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

Petitioner respectfully prays that a writ of certiorari issue to review one aspect of the judgment of the Supreme Court of Washington entered in the above-entitled case, upon denial of a motion for rehearing, on June 25, 1976.

Opinions Below

The opinion of the Supreme Court of Washington, Appendix B infra, is reported

in _____ Wn.2d _____, 548 P.2d 1058 (1976). The Memorandum Decision, Findings and Conclusions and the Order and Judgment of the Superior Court for Pierce County, the Honorable William L. Brown, Jr., entered on December 23, 1974, and April 8, 1975, Appendices C through E, are unreported.

Jurisdictional Grounds

The judgment of the Supreme Court of Washington (App. B) became final, upon denial of motion for rehearing by a vote of seven to one, on 25 June 1976. (App. B-67). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970).

Question Presented

Whether, consistently with established principles of tribal immunity, a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and non-tribal fishermen.

Treaties and Statutes Involved

The treaties and statutes involved are set forth in Appendix A.

Statement of the Case

This case arrives in this Court for

the third time during its thirteen-year history. It was initiated originally by the Washington Departments of Game and Fisheries in the Superior Court for Pierce County against the tribe and certain named individuals seeking to enjoin alleged violations of state fishing laws. On certiorari here for the first time, this Court, viewing the case as one involving state power to regulate off-reservation fishing (391 U.S. at 396 n.11), ruled that a state prohibition against Indian net fishing could be sustained only as "a reasonable and necessary" conservation measure. Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392, 403 (1968). The Court pointed out that on remand "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the [treaty] phrase 'in common with.'" Id.

On remand, the Department of Game assumed what the trial court called an "adamant" posture that Indians had no rights other than those of non-Indian citizens. The trial court denied injunctive relief on conservation grounds, ruling that the Game Department "had failed to give any consideration to Indian Treaty fishing rights as decreed by the Supreme Court." Memorandum Opinion of Rummel, J., November 24, 1970, Pierce County Superior Court. On appeal, the

Washington Supreme Court upheld as reasonable a 1970 Fisheries Department regulation allowing limited Indian net fishing for coho salmon on the Puyallup River and a 1970 Game Department regulation precluding all Indian net fishing for steelhead. Department of Game v. Puyallup Tribe, 80 Wn.2d 561, 497 P.2d 171 (1972). On certiorari for a second time, this Court held that the Department of Game's 1970 total prohibition against Indian net fishing for steelhead on the Puyallup was an invalid "discrimination" because "all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians, is allowed." Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44, 48 (1973). The order of remand from this Court led to the first state authorized Indian net fishery for steelhead on the Puyallup River during the 1973-74 winter season, more than ten years after the initiation of the action, and more than five years after this Court made clear that state closures of off-reservation Indian fisheries must be justified by conservation needs.

Two federal adjudications, to which both the Department of Game and the Puyallup Tribe are parties, intervened some months before the instant case came on for its third trial. In February and March of 1974, Senior District Judge George H. Boldt of the Western District of Washington, in

the exercise of his continuing jurisdiction over virtually all aspects of treaty fishing rights of more than 20 tribes in the region, entered a series of rulings affecting a wide range of issues—including tribal self-regulation, allocation of anadromous fish resources among treaty and nontreaty fishermen, and the power of the state to restrict off-reservation fishing for conservation purposes. United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 96 S.Ct. 877 (1976). On the single issue of the inclusion of hatchery steelhead in computing off-reservation Indian rights on the Puyallup River, Judge Boldt initially deferred to the state courts,[1] although he has since refused to accord preclusive effect to the Washington Supreme Court decision on the natural-hatchery distinction and has twice ruled that the state lacks

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[1]"Discharge of [the responsibility to distinguish between native and propagated steelhead] appears to be within the jurisdiction of this court by issues all parties have submitted. . .However, under the Puyallup II mandate to the State Supreme Court it appears appropriate to this court that the state courts hear and determine the matter referred to, at least in the first instance." 384 F.Supp. at 344-45.

the power to regulate on-reservation Indian fishing.[2] The second federal adjudication before the latest trial of the instant case occurred in May 1974. The Ninth Circuit Court of Appeals entered a ruling in a separate lawsuit initiated by the United States on behalf of the Puyallup Tribe against the state seeking a declaration "that the Puyallup Indian Tribe and its authorized representatives have exclusive right to, and regulation of, all fishing on or in the Puyallup River within the Puyallup Indian Reservation."[3] The complaint prayed for injunctive relief enjoining the state defendants from exercising jurisdiction over and interfering with Indian fishing within reservation boundaries. Before the Ninth Circuit, the state challenged "the continued existence of the Puyallup Indian Reservation and, as a consequence, the right of the Puyallup Tribe of Indians to fish, free from State interference, on the part of the Puyallup River lying within the Reservation." United States v. Washington, 496 F.2d 620 (9th Cir. 1974). The court rejected this claim and held that the reservation "continues to exist." Id. at 621. Certiorari was denied. 419 U.S. 1032 (1974).

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[2] Order of October 22, 1975; Order of Aug. 13, 1976.

[3] Complaint, Civ. No. 39-71 (W.D. Wash.).

The instant case was tried for the third time in the Pierce County Superior Court in June of 1974. On January 9, 1974, in an amended pleading, the Department of Game had sought a declaration that it possessed the sole authority to regulate the taking of steelhead by the Puyallup Tribe on the Puyallup River. Complaints in intervention filed by two sportsmen's groups, Northwest Steelheaders Council of Trout Unlimited and the Western Steelheaders, Inc., made claims that sports fishermen were entitled to all hatchery steelhead in the Puyallup River by reason of contributions to the hatchery program represented by sportsmen's license fees and excise taxes.

By answer, filed on May 23, 1974, by motion for continuance filed before trial, at the trial (ST. 1-12), by motion for reconsideration and by proposed findings and conclusions (Defendants' Proposed Findings and Conclusions 24-25), the tribe asserted that the intervening decision of the Ninth Circuit confirming the existence of the Puyallup Reservation mooted the remand because of the lack of state power to regulate on-reservation fishing. By these same procedural mechanisms, the tribe continuously asserted its sovereign immunity. Undisputed testimony at trial establishes that the tribal steelhead fishery occurs almost exclusively on the river within the exterior boundaries of the reservation. (ST. 773-74). The trial

court acknowledged the Ninth Circuit's ruling that the Puyallup reservation "had not been terminated and extinguished,"[4] found that the tribe's intention is to take 90 to 100 percent of all its future steelhead harvest within the reservation boundaries (FF XVIII, App. D - 17), averred that "the extent of [the treaty] right within the boundary of the former Puyallup Indian Reservation is not now before this court" (CL IV, App. D - 20), but then concluded that treaty rights, even when exercised on-reservation, permitted the taking of no hatchery fish whatsoever and no more than 45 percent of the harvestable natural run. By the court's computation this came to an annual tribal catch of 3,310 fish[5] or perhaps 3,280 fish.[6] The trial court assumed a continuing jurisdiction to regulate the on-reservation steelhead fishery for purposes of both conservation and allocation, and ordered the tribe to file with the court an authenticated roll

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[4] FF XVI, App. D 16-17. In his Memorandum Decision (App. C - 37), however, the trial court concluded that an earlier state court opinion that the Puyallup Reservation no longer exists was "the law of this case."

[5] FF XXII, App. D 19.

[6] Order and Judgment, App. E 3.

of authorized fishermen and weekly catch reports during the steelhead season. FF VIII, App. D - 11; FF XXI, App. D - 18; CL VII, App. D - 21; Order and Judgment, App. E 3-4. While this case was sub judice before the Washington Supreme Court, during last winter's steelhead season the trial court exercised its continuing jurisdiction over the on-reservation fishery and entered a temporary restraining order against further treaty fishing on a finding that the tribe "has exceeded its treaty entitlement of 2,866 steelhead for the 1975-76 winter steelhead run." Order of February 3, 1976. On February 6, 1976, the trial court entered another order directing the Puyallup Tribe, through its officers, to enact a closure of tribal steelhead fishing and to enforce it. This was followed, on February 27, 1976, by a judgment of contempt reiterating the closure directive and directing the Department of Game to take on-reservation enforcement action.

Proof at trial during June of 1974, established that the tribe has regulated its fisheries for a number of years by regular enactment of ordinances, and openings and closures. (ST. 762-73, 777, 779, 801, 803-05, 900, 905, 924-25; Exh. 74-P, 74-Q). Indeed, the regulation enacted by the Game Department approving a tribal steelhead fishery for the 1973-74 season following this Court's decision in

Puyallup II borrowed heavily from existing tribal ordinances. (ST. 802). The tribe now fishes under the auspices of the federal court decision of Judge Boldt, which calls for information exchanges among parties and the filing of tribal and state fishing regulations with the court. See 384 F.Supp. at 420. Overall, there are 20 full time tribal fishermen, 20 more who fish on a part time basis, and 20 others who fish occasionally but rely heavily on different runs for support (ST. 758-60; FF XV, App. D - 16). The 20 full time fishermen support not only themselves but also another 10 families. (ST. 759). As many as 150 members of the tribe are supported by these year round fishing activities. (ST. 759). The income of tribal members is low, and is heavily dependent upon fishing opportunities. (ST. 760-61). The tribe itself has approximately 850 members according to figures of the Bureau of Indian Affairs (ST. 755), and is governed by a council. (ST. 754). The chairperson of the tribe, Ms. Ramona Bennett, is a member of the council (ST. 755) and testified at trial. Biological expertise for tribal management of its fisheries is provided by the Northwest Indian Fisheries Program of the United States Fish and Wildlife Service, whose director at the time, Mr. James Heckman, testified at trial. (ST. 671-753, 960-1063). The chief witness for the Game Department described the 1973-74 Puyallup

River tribal steelhead fishery as "rather orderly." (ST. 1103-04). The tribal net fishery, by all accounts, is accomplished without trespassing on private lands. The Puyallup fisherman anchor their set nets to bridges and employ small boats to place their drift nets. (See ST. 486-87, 805). The actual steelhead catch by tribal fisherman for the 1973-74 season was estimated by Mr. Heckman to be approximately 1,900 fish (ST. 971-72), although the Department of Game put the figure at approximately 3,000 (ST. 1103). In any event, the tribal catch did not exceed the 3,300 fish allocation ordered initially by the trial court. (FF XXII, App. D - 19; Order and Judgment, App. E - 3).

Proof at trial dwelt mostly on the respective sizes of natural and hatchery steelhead runs in the Puyallup River, the funding origins of the hatchery plants, the interrelationships between hatchery and natural fish, and the reliability of methods for distinguishing between the two. Factual representatives made to this Court during argument in Puyallup II[7] are

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[7] 414 U.S. at 48:

> At oral argument counsel for the Department of Game represented the catch of steelhead that were developed from the hatchery program were

revised substantially by the present record: the size of the natural run, assumed to approximate 5,000-6,000 fish during the second appeal of this case, see 80 Wn.2d at 572-73, 497 P.2d at 178-79, was fixed by the trial court at 14,715 fish (FF XII, App. D 14-15), in light of estimates extracted from the Game Department of a combined natural-hatchery run of 56,000 fish (Exh. 74-U; see ST. 1065-67). The size of the hatchery steelhead run was found to represent not 60 or 80 percent of the total run but only 50 percent. (FF XI, App. D - 14). The state game fund supports approximately two thirds of the operating costs of the Game Department's steelhead program. (ST. 144-46). Hunting and fishing license fees account for 75 to 80 percent of the operating funds of the Department of Game (FF IV, App. D 19-10) about half coming from hunting licenses and half from licenses relating to fishing. (See ST. 164, 232). Steelhead fishermen account for approximately 25 percent of the funds attributable to fishing licenses; stated

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in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the catch of that program was financed by license fees of sports fishermen.

another way, steelheaders account for 10 percent of the entire Game Fund. (ST. 164, 240-41). On a capital investment basis, the principal witness for the Department of Game testified, the replacement value of the Department's steelhead hatchery program facilities is $33 million, three-fourths of which is accounted for by federal and mitigation money compensating for fisheries resources destroyed by hydroelectric and other projects. (ST. 133-37). If forced to rely on state funding alone, the Department would be able to produce only slightly in excess of 1 million of the current annual steelhead production of 5 million smolts (FF IX, App. D - 12; ST. 404-06).

Evidence offered by the tribe was circumscribed sharply by evidentiary rulings of the trial court, although the case was tried without a jury. Testimony and exhibits offered to show extensive federal funding of western Washington hatchery facilities and smolts was excluded on objection of the Department and sportsmen's groups. (ST. 324, 328, 702-03, 717, 736-40, 744, 990-1004; Exhs. 74-C, 74-K, 74-M). Similar rulings were made to exclude evidence on matters outside the Puyallup River watershed (ST. 324, 572, 702-03, 878, 990-1004), and evidence dealing with competition for survival between hatchery and natural steelhead (ST. 328-31; Ex 74-E, 74-F).

Most importantly, testimony and exhibits dealing with environmental degradation of the Puyallup watershed, offered to show widespread adverse effects on the spawning and rearing of naturally produced steelhead, was excluded repeatedly on objection of the Department and sportsmen's groups (ST. 668-69, 683-94, 720-25). This severely impacted on the tribe's contention that any treatment of hatchery fish for purposes of the treaty cannot be divorced from a consideration of the erosion of the rights associated with the advances of civilization. Despite these adverse rulings, there is evidence in the record documenting severe environmental abuses affecting adversely the watershed and its anadromous fish populations. (ST. 124-28; 260-64; 726-31).

Rulings Below

Throughout the trial and in several post trial submissions, the petitioners, defendants below, argued the issues raised here of lack of state power to regulate fishing on-reservation and tribal sovereign immunity. (See page 7, supra). These contentions were rejected by the trial court (Memorandum Decision, App. C - 51; Findings and Conclusions, CL I, App. D - 19, CL VII, App. D - 21; Order and Judgment, App. E - 3) and by the state Supreme Court (_____ Wn.2d at _____, 548 P.2d at 1063, 1069, 1074, App. D 5-8,

27, 43).

In the opinion of the Supreme Court of Washington, tribal sovereign immunity and on-reservation jurisdictional objections were without merit for two reasons: first, the court read this Court's rejection of sovereign immunity claims in Puyallup I (391 U.S. at 396 n.11) as still controlling because the case was analogized to "a suit to enjoin violations of state law by individual tribal members fishing off the reservation." _____Wn.2d at _____, 548 P.2d at 1063, App. B - 6. Second, the court read the remand in Puyallup II as mandating an allocation of the entire steelhead run, and enforcement of that allocation by state authorities without regard to reservation boundaries. Id. at _____, 548 P.2d at 1063, App B - 6. On the issue of the treaty applicability to hatchery fish, the prevailing opinion assigns three reasons for denying an Indian entitlement: first, the court found it "inconceivable," in view of the "inexhaustible" supply of fish at treaty times, that the parties "intended the Treaty to create any rights beyond the natural run." Id. at _____, 548 P.2d at 1071, App. B - 31. Second, the court read the shellfish proviso[8] to the treaty "right of taking fish"

[8] "Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they

as suggesting "that the rights secured to the tribe under the treaty did not encompass artificially propagated sources of fish." Id. at _____, 548 P.2d at 1071, App. B 33-34. Third, the court grounded exclusion of the hatchery fish from the scope of the treaty right on a "consideration of equity" said to be supported by the fact "that the steelhead program conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other 'user fees.'" Id. at _____, 548 P.2d at 1071-72, App. B - 6 (footnote omitted). This was described as a "subsidy" to the Indian fishery, supported by reference to the concurring opinion of Mr. Justice White in Puyallup II. 414 U.S. at 49-50. The disposition of the state Supreme Court, with one important qualification, was to affirm the judgment of the trial court in all respects. The qualification took the form of a direction to the Department of Game to determine annually the size of the natural steelhead run on the Puyallup River and the number of fish represented by the tribe's share (45 percent), and to enforce that allocation. _____ Wn.2d at _____, 548 P.2d at 1073-

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shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter." 10 Stat. 1133, App. A - 2.

74, App. B 41, 44.

Chief Justice Stafford joined by three other justices concurred in the result on the ground that Puyallup II mandated an apportionment between treaty and nontreaty fishermen of the entire steelhead run. "At first blush," Chief Justice Stafford wrote, "it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court," citing such cases as Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and Menominee Tribe v. United States, 391 U.S. 404 (1968). But Chief Justice Stafford assumed nonetheless that Puyallup II must be read as repudiating sub silentio this line of authority: "If the Supreme Court had not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce." _____ Wn.2d at _____, 548 P.2d at 1075, App. B 46-48.

Justice Rosellini concurring in part and dissenting in part, reasoned that the Treaty of Medicine Creek could not have reserved an exclusive right to fish and control fishing on-reservation, pointing out that such a right is reserved with specificity in the Walla-Walla Treaty. Id. at _____, 548 P.2d at 1077, App. B 55-56. He would find a denial of equal

protection to other citizens in any treaty right that gives Indians superior rights.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Washington encroaches severely upon federally protected rights indispensable to the livelihood of the members of the Puyallup and other tribes. Ironically, it has transformed this Court's reversal in Puyallup II of the Game Department's consistent refusal to recognize Indian rights into an instrument for eroding these rights still further by summary use of state powers. If the judgment stands, its impact will be severe -- not only upon the Puyallup fishery essential to sustenance of tribal members but on tribal self-regulation and the integrity of control over other on-reservation tribal affairs. The issues call for determination and consideration by this Court.

I.

First: The decision of the court below is in conflict with the decision of this Court in Puyallup I and II and other decisions of this Court and the lower federal courts permitting restrictions upon any Indian fishery only upon a strict showing of conservation necessity. The State "must demonstrate that its regulation

is a reasonable and necessary conservation measure . . ., and that its application to the Indians is necessary in the interest of conservation." Antoine v. Washington, 420 U.S. 194, 207 (1975) (emphasis in original), citing Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973); Tulee v. Washington, 315 U.S. 681, 684 (1942). The decision below authorizes the Game Department to determine annually the number of fish represented by the allocation (45 percent of the natural run), and to enforce that allocation by a closure on-reservation without regard to conservation necessity. This is exactly what happened only last winter while this case was pending before the Washington Supreme Court. The trial court chose to exercise its continuing jurisdiction, recompute downwards the tribal share (from 3,310 fish to 2,866 fish) and order an on-reservation closure without a colorable conservation justification (p. 9, supra). The decision below approving this practice would be wrong were it applied to an off-reservation fishery, and is twice wrong because it is applied to an on-reservation fishery.

Second: By holding that state authorities may regulate tribal fishing on the reservation, the court below contradicts settled principles of Indian law going back to the early days of the Republic.

The concurring opinion of Chief Justice Stafford concede the problem by acknowledging that"it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court." _____ Wn.2d at _____, 548 P.2d at 1075, App. B 46-47, citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and Menominee Tribe v. United States, 391 U.S. 404 (1968), among other authorities.

By reading Puyallup II as discarding this unbroken line of precedent, the state Supreme Court departed from well established principles protecting the authority of an Indian tribe to regulate the conduct of its members free from state interference. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), of course makes clear that the tribes are recognized as "distinct, independent, political communities" qualified to exercise powers of self-government "not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignity." F. Cohen, Handbook of Federal Indian Law 122 (1942). This principle has survived in decisions of this Court through Ex Parte Crow Dog, 109 U.S. 556 (1883), holding that tribal courts alone had jurisdiction over the murder on-reservation of one Sioux Indian by another, and Williams v. Lee, 358 U.S. 217 (1959), forbidding the exercise of

state court jurisdiction over a suit by a non-Indian to collect on a debt incurred on-reservation, to McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), barring the imposition of a state income tax on earnings of Indians derived from on-reservation activities. Whether the theory be one of tribal sovereign immunity or federal preemption by treaties and statutes, see id. at 172, the question to ask, according to Williams v. Lee, is whether the particular state initiative "infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. Only last term this Court applied the teaching of Williams v. Lee and similar cases to foreclose state court jurisdiction over an Indian adoption proceeding where the parties resided on-reservation and the conduct occurred there. Fisher v. District Court, 96 S.Ct. 943, 946 (1976). See also Seymour v. Superintendent, 368 U.S. 351 (1962).

That the exercise of state power here at issue encroaches heavily on the Indians' right "to make their own laws and be ruled by them" is, we submit, overwhelmingly clear. The state courts have asserted nothing short of a power to nullify tribal regulation of the single activity that is indispensable to the economic well being of the membership and their traditional

values. It is difficult to conceive of an intervention in tribal self-government more demeaning and decisive than an order to its governing body to enact and enforce an ordinance curtailing the memberships' chief economic activity. This is not a tax on income earned, as was condemned in McLanahan, but a ban on earning income. The court below has approved the exercise of a continuing jurisdiction, replete with administrative details, that places the practical governance of an important tribal fishery in the hands of state officials whose hostility has been clearly recorded. See United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975), cert. denied, 96 S.Ct. 877 (1976) (Burns, J., concurring) (recalcitrance of state officials, and vocal commercial and sports fishermen produced denial of Indian rights requiring intervention by federal district court).

Not only can the Game Department point to no federal statutory authority justifying this unprecedented encroachment over a tribal fishery, the legislation that can be found points the other way. The well known Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1162 (1970), App. A 2-3, granting certain states jurisdiction over some offenses committed by or against Indians in "Indian Country," contains an exclusion that hardly could be

more specific:

> Nothing in this section. . .shall deprive any Indian or any Indian tribe, band, or community of any right, privilege or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

By inviting state authorities to close fisheries on the reservation, the decision below flatly offends 18 U.S.C. § 1162, not to mention a local variation of the same proposition, R.C.W.A. § 37.12.060 (1964), and a host of federal court decisions. Only last year the Ninth Circuit read the Treaty of Medicine Creek as confirming a proposition now contradicted by the decision below:

> The right to take fish in common with the settlers off the reservations was a right reserved by the Indians in addition to their right to occupy and use reservation land. The settlers obtained no analogous rights on the

> reservations. Other citizens clearly have no more claim to a share of the fish caught on the reservations than they do to a right to reside on these reservations. The court thus did not abuse its discretion in excluding fish caught on the reservations from the apportionment.

520 F.2d at 690.

The judgment below, by authorizing state control over an on-reservation fishery, conflicts either with direct holdings or considered dicta of an unbroken line of authority, including decisions of this Court, Menominee Tribe v. United States, 391 U.S. 404, 411 n.12 (1968) ("the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress "); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) (affirming restraint against non-Indian encroachment upon reservation fisheries); decisions of the lower federal courts, Kimball v. Callahan, 493 F.2d 564, 568 (9th Cir.), cert. denied, 419 U.S. 1094 (1974) (although the former reservation lands in question were "no longer legally occupied by the Klamaths"); Moore v. United States, 157 F.2d 760 (9th Cir.),

cert. denied, 330 U.S. 827 (1946); Mason v. Sams, 5 F.2d 255 (W.D. Wash. 1925); Quechan Tribe v. Rowe, 350 F.Supp. 106 (S.D. Cal. 1972); Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (D. Minn. 1971); Klamath & Modoc Tribes v. Maison, 139 F.Supp. 634 (D. Ore. 1956), modified, 338 F.2d 620 (9th Cir. 1964); United States ex rel. Lynn v. Hamilton, 233 Fed. 685 (W.D. N.Y. 1915); In re Lincoln, 129 Fed. 247 (N.D. Cal. 1904); In re Blackbird, 109 Fed. 139 (W.D. Wis. 1901); Oneida Tribe of Indians v. United States, 165 Ct. Cl. 487, cert. denied, 379 U.S. 946 (1964); and of the state courts, Donahue v. California Justice Court, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (1971), cert. denied, 404 U.S. 990 (1971).

In Mattz v. Arnett, 412 U.S. 481, 506 (1973), this Court held that the Klamath Indian Reservation had not been terminated by Act of Congress and therefore remained "Indian Country" for purposes of 18 U.S.C. § 1151. The Court pointed out, however, that it was deciding nothing regarding the existence of Mattz' fishing rights or the application of California law notwithstanding the reservation status, 412 U.S. at 485, although on remand the state court applied the general rule foreclosing state jurisdiction over on-reservation fishing. Arnett v. Five Gill Nets, 48 Cal. App. 3d

454, 461-62, 121 Cal. Rptr. 906, 911-12 (1975), cert. denied, 96 S.Ct. 1500 (1976). In the instant case the court below, mistakenly we believe, read this Court's remand in Mattz as making state jurisdiction over on-reservation fishing an "open question," ____ Wn.2d at _____, 548 P.2d at 1063, App. B - 7, then proceeded to resolve it against the tribe. The decision thus misreads Mattz, misconstrues the scope of the remand in Puyallup II, and contradicts other basic principles of Indian law. All are sufficient reasons to require correction here.

Third: By ruling that tribal fishing rights extended to none of the hatchery fish and less than half of the harvestable natural steelhead run, the Washington Supreme Court effectively extinguished tribal community fishing rights in more than three-fourth's of the harvestable steelhead in the river. By doing so and by going further to authorize a continuing administrative authority over tribal fishermen and catch, the court grossly exceeded its jurisdiction and offended principles of tribal sovereign immunity that are firmly established, misapplying in the process this Court's decision in Puyallup I.

The tribe's objection on this point was thought by the Washington Supreme Court, _____Wn.2d at _____, 548 P.2d at 1063,

App. B - 6, to be answered fully by the ruling of this Court in Puyallup I where sovereign immunity objections were answered as follows: "This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts." 391 U.S. at 396 n.11.

The Washington Supreme Court, we believe, has misread this narrow rejection of sovereign immunity claims in the early phases of this litigation to make the tribe a virtual prisoner in the state courts, answerable to any claims regarding fishing that happen to be asserted by the state or by any intervenor. A number of factors combine to contradict this reading of Puyallup I: first, the Ninth Circuit's decision confirming the existence of the reservation has transformed this litigation from what was presumed to be an off-reservation case to what is known to be an on-reservation case.[9] Second,

[9] This Court always has understand Puyallup I to be applicable only to off-reservation activity. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973).

the instant case presents not even a colorable claim of a violation of state law. Allegations of violence during the fishery were included in the Department's amended pleading but were repudiated by a Department witness at trial (ST. 1104-05) and are wholly unsubstantiated by the record. No conservation justification is offered either for excluding hatchery fish from the treaty or for allocating the natural run. What the court below has done, purely and simply, is to resolve basic issues of treaty rights adversely to the tribe over continuing jurisdictional and sovereign immunity objections. Third, the analogue of the prosecution of individual Indians is exploded thoroughly by a recognition that what has been accomplished is to exempt a substantial segment of the steelhead in the river from the terms of the federal treaty.

Under these circumstances, the decision below conflicts with firmly established principles extending to the tribe an immunity coextensive with that available to the United States. E.g., United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940); Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974). If tribal sovereign immunity operates to bar a suit against a tribe for negligence

claims growing out of the operation of a bridge on-reservation, Haile v. Saunooke, 246 F.2d 293 (4th Cir.), cert. denied, 355 U.S. 893 (1957), or of a tribal resort, Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968), or of the conduct of an election, Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967), then one wonders why it does not preclude a lawsuit that strikes heavily at the income of tribal fishermen by curtailing their opportunities to make a living. Indeed, were a state agency to file suit against the tribe tomorrow in the Pierce County Superior Court, State of Washington, seeking an allocation, let us say, of the Puyallup River coho salmon run, we believe the suit would be subject to summary dismissal on sovereign immunity grounds. The result should not be different where, as here, an action initiated thirteen years ago gradually evolves into an attempted adjudication of tribal community fishing rights.

Fourth: The decision of the court below is in clear conflict with the decision of the Ninth Circuit confirming the existence of the Puyallup Reservation, United States v. Washington, 496 F.2d 620 (9th Cir.), cert. denied, 419 U.S. 1032 (1974), and of Judge Boldt's decisions also affirmed by the Ninth Circuit, allocating the Indian and non-Indian catch. United States v.

Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 96 S.Ct. 877 (1976). The Ninth Circuit decision, holding that the reservation still exists, a fortiori resolves the question of the tribe's exclusive power to regulate the fishing of its members on-reservation. That the issues are one and the same was conceded by state authorities in the continuing litigation before Judge Boldt,[10] and for all practical purposes thirty years ago before this Court. Tulee v. Washington, 315 U.S. 681, 683 (1942). By holding that state regulation may ensue despite reservation status, the tribe's long awaited success in winning judicial recognition of the reservation is rendered a nullity. The decision below also contradicts, sometimes purposely so, several aspects of Judge Boldt's decisions, including those permitting the tribe to fish under its own regulations properly filed in the federal court, those allocating the Puyallup River steelhead fishery on a 50-50 basis[11] among the tribal and sports fisheries, and those barring on-reservation enforcement powers.

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10 "An exclusive right of fishing was reserved by the tribes within. . .their reservations. This proposition is not denied or challenged by any party in this case." 384 F.Supp. at 332 & n.12. See id. at 341.

11 Id. at 343-45 (spelling out the allocation formula).

The state court judgment asserts under a slightly different rationale the conclusion that the Puyallup Reservation does not exist, and thus repeats again a holding that already has prompted this Court once to enter a summary reversal. Satiacum v. Washington, 414 U.S. 1 (1973) (per curiam) (on the ground, however, that a federal question had been decided unnecessarily). By allowing the Game Department to relitigate questions of power over Indian fishing on-reservation, previously resolved by litigation in the federal courts, the decision not only creates a conflict requiring review before this Court but also offends basic principles of collateral estoppel. City of Tacoma v. Taxpayers, 357 U.S. 320 (1958). This separate ground, alone and in combination with the others, is reason enough for granting the writ.

II.

For the reasons stated above, we believe the Washington Supreme Court erred in reading Puyallup II as approving, without regard to reservation status, the assumption by the state courts of a power to decide the question of treaty entitlement to hatchery fish, allocate the natural run and enforce the allocation on-reservation. On the merits of the treaty applicability to hatchery steelhead, we believe the decision below to be equally wrong.

It represents, in our view, a fundamental misreading of the language and purposes of the treaty, a misunderstanding of the relevance of sources of funding to the scope of a federally protected fishing right, and a rule that is unworkable in fact. The decision was made, moreover, on a record improperly curtailed, particularly as regards evidence of environmental degradation of the Puyallup watershed. We do not seek certiorari on this second issue, however, for the reason that the tribe has an adequate remedy available to it. On August 13, 1976, the Honorable George H. Boldt of the United States District Court, Western District of Washington, entered an order clarifying his intention to proceed to trial on certain environmental claims of all western Washington tribes and on the claims of all tribes to an entitlement to hatchery stock included in all anadromous fish runs. The separate tribes, including the Puyallup Tribe, the United States, and state authorities are parties to that proceeding. For this reason, the tribe is not at this time seeking certiorari on the second issue of treaty applicability to hatchery fish.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition

for a writ of certiorari should be granted to review the question of state court jurisdiction to adjudicate on-reservation Indian fishing.

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APPENDIX A

Treaty and Statutory Provisions Involved

Treaty of Medicine Creek
10 Stat. 1132 (1854)

* * * *

ARTICLE II. There is, however reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: . . . . all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

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18 U.S.C. §1162. State jurisdiction over offenses committed by or against Indians in the Indian Country.

* * * *

(b) Nothing in this section shall . . . . deprive any Indian or any Indian

tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

APPENDIX B

IN THE SUPREME COURT

OF THE

STATE OF WASHINGTON

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,	)	
Respondent,	)	
NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,	)	NO. 43736
Intervenor-Respondents,	)	EN BANC
WESTERN STEELHEADERS, INC.,	)	
Intervenor-Respondents,	)	
v.	)	
PUYALLUP TRIBE, INC., et al.,	)	
Appellants.	)	Filed APR 8 1973

HUNTER, ASSOCIATE JUSTICE

The appellants (defendants), the Puyallup Tribe and Ramona Bennett, the Tribal Council chairwoman,[1] appeal from a decision of the Superior Court for Pierce County, which determined the extent of their right to commercially fish for steelhead. The Washington State Department of Game has also appealed from certain aspects of the trial court's decision.

This case does not involve a conflict of recent origin. Rather, the initial litigation commenced in 1963. Since that time, we have written two decisions, both of which have been reviewed by the United States Supreme Court. In order to place the present case in proper perspective, we shall initially set forth the nature of the issues previously raised and the decisions rendered.

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[1] As we have pointed out twice before, "[t]he case caption is erroneous, there being no entity known as 'The Puyallup Tribe, Inc., a corporation.' The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council." Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 247 n.1, 422 P.2d 754, 755 (1967), quoted in Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 563 n.1, 497 P.2d 171 (1972).

In Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 422 P.2d 754 (1967), we recognized that the Puyallup Tribe still existed and that its members enjoyed certain fishing rights under the Treaty of Medicine Creek. Furthermore, we held that these rights could only be limited through statute or regulations to the extent reasonably necessary for the conservation of the fishery. On review, the United States Supreme Court affirmed our decision. It held that while the rights secured by the treaty extended to off-reservation fishing, nevertheless "the manner of fishing, the size of take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." Puyallup Tribe v. Department of Game, 391 U.S. 392, 398, 20 L. Ed. 2d 689, 88 S. Ct. 1725, 1728 (1967) (hereinafter cited as Puyallup I). However, that Court remanded the case for a determination of the issue of whether the total bar against the use of set nets in freshwater streams or at their mouths was a reasonable and necessary conservation measure. In response to this decision, the Department of Fisheries, charged with the duty of regulating the salmon fishery, changed its regulations to allow a net fishery for salmon in those areas of

the Puyallup River not utilized for spawning.

On the other hand, the Department of Game, which is the governing agency with regard to steelhead, refused to pass a similar regulation and continued to prohibit all net fishing for steelhead trout. In an appeal to this Court, we held that the regulations passed by the Department of Fisheries were reasonable and consistent with the necessary conservation standards. Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 497 P.2d 171 (1972). In regard to steelhead, we stated that while the Indians may have a right to a net fishery, nevertheless the steelhead run was not of sufficient size to withstand a commercial net fishery for that year. On review, the United States Supreme Court held that a total ban on net fishing would discriminate against the Indians, since the steelhead fishery was totally preempted by the hook and line, non-Indian sport fishermen. Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (hereinafter cited as Puyallup II). That Court remanded the case for a determination of the percentage of the run which had to be allowed to escape in order to perpetuate the species, and the number of catchable fish which had to be apportioned to an Indian commercial net

fishery. In a concurring opinion, three Justices noted that the majority opinion applied only to the natural run of steelhead.

On remand, the Superior Court for Pierce County held that the fishing rights afforded under the treaty did not extend to the hatchery run, the one-half of the natural run had to be allowed to escape in order to perpetuate the species, and that the Indians were entitled to catch 45 percent of the remaining one-half of the natural run. The Puyallup Tribe has appealed from the trial court's decision in its entirety. The State Department of Game has appeled from that portion of the decision which determined the size of the total natural run and the apportionment of 45 percent of the catchable fish to the tribe.

At the outset it seems appropriate to discuss the jurisdictional aspects of this case. Appellants have contended all along that the state courts do not have jurisdiction in this matter because issues pertaining to federal treaty rights are exclusively federal matters. We believe this contention is without merit for two reasons. First, in this case the State is concerned with a matter that is clearly within its jurisdiction--it is seeking to determine the extent to

which it can apply its sovereign power to regulate resources for the purpose of conservation. See Puyallup I at 398-400. In order to do so, it is necessary to determine the extent to which Indians may be exempt from state regulations because of overriding federal treaty rights. See State ex rel. Campbell v. Case, 182 Wash. 334, 341, 47 P.2d 24 (1935). In this posture, the case is analogous to "a suit to enjoin violations of state law by individual tribal members fishing off the reservation," a situation clearly within state jurisdiction. See Puyallup I at 397 n.11.

Second, a more importantly, jurisdiction is proper because the United States Supreme Court specifically remanded this case for a determination of a fair allocation that "accommodate[s] the rights of Indians under the Treaty and the rights of other people." See Puyallup II at 49. We view Puyallup II as expressly conferring jurisdiction in this matter in the state courts.

It has also been contended that the recently established, continuing existence of the Puyallup Indian Reservation, see United States v. State of Washington, 496 F.2d 620 (9th Cir. 1974), cert. denied, 419 U.S. 1032 (1974), precludes any state jurisdiction over activities

occurring within the reservation boundaries. We believe that this is at most simply not the case, and at least an open question after Mattz v. Arnett, 412 U.S. 481, 485, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1972). In addition, the Supreme Court's clear mandate in Puyallup II would seem to include on-reservation state jurisdiction. In order to control the escapement necessary for the conservation of the species, it is inescapable, given the geography in this case, that the State must be able to control on-reservation fishing activities. State regulation of on-reservation fishing is mandated by, and consistent with, the Supreme Court's view of Indian treaty rights as presented in Puyallup II at 49:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival.

> The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Finally, any suggestion that this Court should defer to the United States District Court of Western Washington, in light of its continuing jurisdiction in a similar fishing matter, on grounds of comity, is not well taken. The present case was remanded by the Supreme Court to the state courts before that federal action was even started. There is no reason we should defer to the subsequently commenced, ongoing litigation in that federal court.

Therefore, we conclude that our jurisdiction is proper. Furthermore, as will be indicated later in the opinion, continuing jurisdiction over the Indians' steelhead fishery must be exercised by the State Department of Game.

Before considering the issues raised by the appellants and cross-appellants, an analysis of the United States Supreme

Court's decision in Puyallup II is essential. Reading Puyallup II in context with Puyallup I, we feel that the issue of whether the Treaty of Medicine Creek gives the Indians a right to a commercial net fishery is at least an open question. In Puyallup II, the United States Supreme Court stated on page 48: "Our prior decision recognized that net fishing by these Indians for commerical purposes was covered by the Treaty. 391 U.S., at 398-399." However, as demonstrated below, the language of Puyallup I does not bear this out. In Puyallup I, the United States Supreme Court made the following statement of page 398:

> The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a

different case if the Treaty had preserved the right to fish at the "usual and accustomed places" in the "usual and accustomed" manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat.

253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U. S. C. § 1401(a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the life may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In the final paragraph of the Puyallup I opinion, the Supreme Court drew the following conclusion on pages 401-03:

> Whether the prohibition of the use of set nets in these fresh waters was a "reasonable and necessary" (70 Wash. 2d, at 261, 422 P.2d, at 764) conservation measure was left for determination by the trial court when the Supreme Court, deeming the injunction in No. 247 too broad,

remanded the case for further findings. When the case was argued here, much was said about the pros and the cons of that issue. Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

(Footnotes omitted.) Therefore, it certainly appears that the United States Supreme Court in Puyallup I declined to interpret the Medicine Creek Treaty with regard to the Indians' right to a net fishery. We recognized this in our second decision, Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 497 P.2d 171 (1972), when we stated on page 568:

> [T]here can no longer be any question that whatever the United States Supreme Court may ultimately construe to be

> the Indian rights to fish under the Medicine Creek Treaty, they are subject to the reach of the state powers and regulations necessary to the conservation of the fishery, providing the regulations are not discriminatory against the Indians.

(Italics ours.)

In addition, it is important to place our decision in the above cases in the correct perspective. The controlling issue there was the validity of regulations enacted by the Department of Fisheries and the Department of Game. The Department of Fisheries' regulations allowed an Indian net fishery in the Puyallup River for salmon, subject to certain limitations for conservation purposes. The Department of Game regulations prohibited a net fishery for steelhead. Our decision was designed to determine the reasonableness of regulations and not to interpret the Treaty itself. It was unnecessary to decide whether the Department of Game was required to pass a regulation allowing a net fishery for steelhead. Consequently, we overstated our case by indicating that an Indian net fishery was a matter of right under the

Treaty. To the extent that our decision lends itself to this interpretation, it is hereby overruled.

Considering the present appeal in this posture, we now direct our analysis to the interpretation of the Treaty of Medicine Creek that we deem to be correct. We feel that an interpretation is necessary as an initial matter in order to arrive at an allocation of steelhead in the Puyallup River that is consistent with and takes into account Indians rights under the Treaty. Those rights must be determined before they can be given effect.

If the Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132), provides the Puyallup Indians with any fishing right at all beyond those possessed by ordinary citizens, the provision that does so is article 3 (10 Stat. 1133). See Puyallup I at 394-95, n.1. The pertinent language of article 3 is the following:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. . .

(Italics ours.) It is the interpretation of this Treaty language that is crucial to any determination of Indian fishing rights. As with any Indian treaty, of course, certain long-standing and often stated rules of construction govern this very significant interpretation.

The rules of interpretation applicable to Indian treaties have been variously stated. Basically, treaties are to be interpreted in accord with the intent of the parties. So far as possible, the sense in which the Indians understood the treaties rather than a technical legal meaning should be given effect. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970); Choctaw Indians v. United States, 318 U.S. 423, 432, 87 L. Ed. 877, 63 S. Ct. 672 (1943); United States v. Shoshone Tribe, 304 U. S. 111, 116, 82 L. Ed. 1213, 58 S. Ct. 794 (1938); Starr v. Long Jim, 227 U.S. 613, 623, 57 L. Ed. 670, 33 S. Ct. 358 (1913), quoting Jones v. Meehan, 175 U.S. 1, 11, 44 L. Ed. 49, 20 S. Ct. 1 (1899); United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581, 8 L. Ed. 483 (1832). The United States Supreme Court stated this principle in Tulee v. Washington, 315 U.S. 681, 684, 86 L. Ed. 1115, 62 S. Ct. 862 (1942), as follows:

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Another recognized rule of construction requires that the language in treaties and statutes ratifying agreements with the Indians be construed liberally in favor of the Indians and never to their prejudice. Antoine v. Washington, 420 U.S. 194, 199, _____ L. Ed. 2d _____, ___ S. Ct. ____ (1975); Choctaw Indians v. United States, supra at 431; Worcester v. Georgia, supra. Likewise, any ambiguities or "doubtful expressions" are to be resolved in favor of the Indians. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), quoting Carpenter v. Shaw, 280 U.S. 363, 367, 74 L. Ed. 478, 50 S. Ct. 121 (1930); Choctaw Nation v. Oklahoma, supra; Winters v. United States,

207 U.S. 564, 576, 52 L. Ed. 340, 28 S. Ct. 207 (1908).

These canons of construction, however, are not without their limitations. With regard to the rule that resolves ambiguities in favor of the Indians, the United States Supreme Court recently stated in DeCoteau v. District County Court, 420 U.S. 425, 447, _____ L. Ed. 2d _____, ____ S. Ct. ____ (1975), as follows:

> We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A cannon of construction is not a license to disregard clear expressions of tribal and congressional intent.

(Italics ours.) Similar limitations apply to all the liberal rules of construction mentioned above. First, the attempt as an initial matter, to prefer the Indians' understanding of a treaty does not mean that their alleged understanding must prevail. "[E]ven Indian treaties cannot be rewritten or expanded

beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." Choctaw Indians v. United States, supra at 432. See Skokomish Indian Tribe v. France, 320 F.2d 205, 207 (9th Cir. 1963). The United States Supreme Court has also stated that

> [w]e attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.

(Footnote omitted.) Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353, 89 L. Ed. 985, 65 S. Ct. 690 (1945).

Second, the Supreme Court has said that it cannot "under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean." Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179, 91 L. Ed. 823, 67 S. Ct. 650 (1947).

Indian rights cannot be determined "under any acceptable rule of interpretations" merely because the Indians thought the right existed. Confederated Bands of Ute Indians on page 180. Hence, if the language in an Indian treaty is clear and unambiguous, then the courts cannot interpret the treaty in a way that will expand or go beyond the rights that are plainly set out by the treaty.

As heretofore stated, the important language to be construed in article 3 of the Treaty of Medicine Creek is "[t]he right of taking fish. . .is further secured to said Indians, in common with all citizens of the Territory." The meaning of this clause is clear and unambiguous on its face. Its plain meaning has significance and confers a distinct benefit. However, interpretation of the Treaty requires us to construe and give meaning to the phrase "in common with."

The general meaning of "common" has changed very little since the Treaty of Medicine Creek was written. Compare N. Webster, An American Dictionary of the English Language 231 (1862), and A Dictionary of American English 575 (W. Craige ed. 1936) with Webster's Third New International Dictionary (1961). The basic definition of "common" is not complicated. "Common" means "of or relating to a

community at large (as a family unit, social group, tribe, political organization, or alliance) . . ." It therefore seems obvious that this treaty provision simply means that the Indians share in common, that is, share equally, with other citizens the opportunity to take fish. This Treaty provision requires that as to their "accustomed grounds and stations" the Indians must not be denied the right to fish to the same extent as all other citizens of the state. State regulations governing fishing resources must treat Indians no better or worse than other citizens.

The United States Supreme Court seemed to recognize this interpretation when it said in the last paragraph of Puyallup I, on page 403, "that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.'" History also supports the view that the intent of the parties, as is clear from the provision's language, was to preserve equal treatment for the Indians.

There were absolutely no limitations on anyone, Indian or non-Indian, as to the steelhead or salmon harvest until the last part of the nineteenth century. See Uncommon Controversy: Fishing Rights

of the Muckleshoot, Puyallup, and Nisqually Indians 61-62 (A Report Prepared for the American Friends Service Comm.) (U. W. Press 1970); Johnson, The States Versus Indian off-Reservation Fishing: A United States Supreme Court Error, 47 Wash. L. Rev. 207, 213-14 (1972).[2] This

[2] Up to 1921, the regulation of the fisheries that did occur was undertaken directly by the state legislature without technical help. The regulations reflected no more than a cursory knowledge of conservation requirements and consisted of limited time closures and increasingly stricter limitations on fixed gear. J. Crutchfield & G. Pontecorvo, The Pacific Salmon Fisheries 131-32 (1969). See, e.g., Laws of 1899, ch. 117, §§ 1 and 2, p. 194-95; Laws of 1897, ch. 82, §§ 1-3, p. 214-16. See also State v. Allen, 80 Wash. 83, 141 P. 292 (1914).

The use of the most effective methods of catching fish, e.g., fixed appliances such as fish traps and setnets, was not completely prohibited until 1935. Laws of 1935, ch. 1, § 8, p. 6. This prohibition was the result not of legislative action but of an initiative measure which was approved at the general election on November 6, 1934. Moreover, it was not until 1947 that the steelhead species was classified as a game fish and thus became

fact clearly indicates that at the time of the Treaty in 1854, the parties did not contemplate the event of conservation requirements necessary to preserve the species. There was an inexhaustible supply of fish, see Uncommon Controversy, supra at 4 n.3, 61-62, and the Treaty was undoubtedly premised on this condition. Consequently, it is inconceivable that the parties to the Treaty contemplated an allocation of the fish or an advantage of one over the other in the manner of taking fish. The fish were there for the taking. It was important only for the Indians to enjoy the right of taking fish in common with, i.e., on an equal basis with, the citizens of the territory. This is exactly what the parties must have intended. It is what the language of article 3 plainly provides in addition to assuring the Indians access to certain geographical fishing areas.

Our interpretation of article 3 means that Indians under treaties concerning fishing rights "in common with all citizens" are, to the same extent as

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note 2 con't.
subject to the special regulations enforced by the Department of Game. See Laws of 1947, ch. 275, § 10, p. 1200.

other citizens, subject to state conservation regulations that meet appropriate standards. See Puyallup I at 398-99. However, the Indians' Treaty right to fish "at all usual and accustomed grounds and stations" cannot be qualified by the state. See Antoine v. Washington, supra at 206-07; Puyallup I at 398; United States v. Winans, supra at 381, 384. Thus the Treaty language guarantees the Indians access to their usual and accustomed fishing grounds. This right of access cannot be contravened by the state even in the exercise of its police power for the conservation of fish as a natural resource. But the state can, for the purposes of conservation, properly regulate the public's right to fish and such regulations are applicable equally to Indians and non-Indians.

The United States Supreme Court's treatment of similar language in other Indian treaties is consistent with the above analysis. For instance, the Court stated in United States v. Winans, supra at 381, that the right of taking fish at all usual and accustomed places

> was a right outside of those boundaries [the reservation] reserved "in common with the citizens of the Territory."

> As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise.

The Court further stated that this right does not "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised." United States v. Winans, supra at 384.

Other Supreme Court treatments of this problem recognize more explicitly the equal regulation aspect. In New York ex rel. Kennedy v. Becker, 241 U.S. 556, 563, 60 L. Ed. 1166, 36 S. Ct. 705 (1916), which, as against Indians claiming a treaty right, upheld a state regulation prohibiting spear fishing, the Supreme Court justified the result as follows:

> Rather are we of the opinion that the [treaty] clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in

> common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State . . .

(Italics ours.)

In Tulee v. Washington, supra at 685, the Supreme Court held that a state regulation requiring license fees for fishing could not be applied to Indians because "such exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty." However, the Supreme Court did clearly recognize the State's right to regulate for conservation when it stated earlier in the opinion on page 684, that

> the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of

> fishing outside the reservation as are necessary for the conservation of fish . . .

(Footnote omitted.)

Further support for the interpretation presented above -- that the Indians share equally, i.e., in common with other citizens, the public right to fish and, in addition, are guaranteed access to certain fishing locations -- is found in Seufert Bros. Co. v. United States, 249 U. S. 194, 63 L. Ed. 555, 39 S. Ct. 203 (1919). This case is particularly relevant because it involved article 3 of the Treaty with the Yakimas, June 9, 1855 (12 Stat. 25). That provision is nearly idential to article 3 of the Treaty of Medicine Creek. The two treaties were entered into contemporaneously. See 249 U.S. at 196. The Supreme Court interpreted the treaty language as follows:

> How the Indians understood this proviso we are considering is not doubtful. During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the

> lower court applies, and they have shared such places with Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right to resort to these fishing grounds and make use of them in common with other citizens of the United States,--and this is the extent of the right that is secured to them by the decree [injunction] we are asked to revise.

Seufert Bros. Co. v. United States, supra at 198-99. See Puyallup I at 399.

We conclude therefore that a proper interpretation of the Treaty of Medicine Creek permits the state to promulgate conservation regulations meeting appropriate standards that affect all citizens, Indian and non-Indian, equally. However, such regulations cannot deny the Indians access to their usual and accustomed fishing places, nor can they restrain Indian fishing at those places except to the extent the regulations restrain the fishing

rights of all state citizens, e.g., regulations as to time and manner of fishing, size of catch, etc.

It should be noted that this interpretation of the Treaty grants to the Indians certain rights that they otherwise would not clearly have retained at the time. In addition to guaranteeing access to certain fishing locations, article 3 of the Treaty put them on an equal footing with "all citizens of the Territory." Admittedly, such equal treatment would be superfluous today--it would give the Indians no additional rights beyond those that they already possess. But at the time of the Treaty, equal footing with citizens of the Territory was very significant. When the Treaty was written Indians were not citizens and, in addition, some of the normal methods of obtaining citizenship were not open to them. See F. Cohen's Handbook of Federal Indian Law 154 (1971). Article 3 served a definite purpose because it assured the Indians that they would have a right to uninhibited access to their usual and accustomed fishing grounds. This guarantee was not unimportant in the context of a government policy designed to restrict the Indians to residence on the reservations as much as possible in order to avoid conflict between the Indians and the settlers. See E. Swindwell, Report

on Source, Nature, and Extent of the Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon 55, 58-59 (Department of the Interior, 1942); Uncommon Controversy, supra at 41-42; Coan, The Adoption of the Reservation Policy in Pacific Northwest 1853-1855, 23 Oregon Historical Quarterly 1, 12, 14 (1922). Consequently, the interpretation above, which means the Indians were assured equal treatment at the time of the Treaty (plus the absolute right of access to certain locations), does not mean that the Indians were merely given something that they would have had even without the Treaty. Cf. United States v. Winans, supra at 380.

Certain Treaty rights may now be nugatory due to subsequent events, that is, they are now enjoyed by the Indians simply because they are citizens of the United States. This does not mean, however, that a court in the context of interpretation can expand and rewrite a treaty beyond its clear meaning at the time it was entered into. See Choctaw Indians v. United States, supra. The Treaty of Medicine Creek clearly provided for significant rights at the time it was concluded. The Treaty cannot now be expanded beyond its unambiguous terms even if some of those terms have been superseded, thus making the Treaty arguably

unjust. See Northwestern Bands of Shoshone Indians v. United States, supra.

Because the Treaty, as well as the equal protection guarantees to the Constitution, demands that the Indians receive equal treatment, it is uncontroverted that any state regulation of fishing may not discriminate, that is, the regulations must apply equally to all citizens whether Indian or non-Indian. See Puyallup I at 398, 403; cf. New York ex rel. Kennedy v. Becker, supra at 562. In the absence of an overriding federal treaty right granting the Indians a right to fish for steelhead trout with nets, state regulations allowing Indians to fish with nets while denying that manner of fishing to other citizens would be discriminatory and, hence, improper. Cf. State ex rel. Campbell v. Case, 182 Wash. 334, 341, 47 P.2d 24 (1935). Equal protection is denied when similarly situated persons, e.g., all state citizens including Indians, are treated differently by allowing only a certain class of fish with nets. See Truax v. Corrigan, 257 U.S. 312, 334, 66 L. Ed. 254, 42 S. Ct. 124 (1921); State ex rel. Bacich v. Huse, 187 Wash. 75, 80, 59 P.2d 1101 (1936). Thus there would be no discrimination if all net fishing, including Indian net fishing, were prohibited. There is also no discrimination where all state

citizens are only allowed to fish by a certain method, e.g., by hook and line. Illegal discrimination would occur only where one group is given special rights that the other group is denied, e.g., allowing only Indians to net fish or allowing only non-Indians to fish with hook and line. See Thomson v. Dana, 52 F.2d 759, 764 (D.C. Ore. 1931), aff'd per curiam, 285 U.S. 529, 76 L. Ed. 925, 52 S. Ct. 409 (1932); State v. Hals, 90 Wash. 540, 542-43, 156 P. 395 (1916); Barker v. State Fish Comm'n, 88 Wash. 73, 76-77, 152 P. 537 (1915).

Therefore, in the absence of special federal rights, state regulations permitting only one group to utilize a certain fishing method would be discriminatory and in violation both of constitutional equal protection guarantees and the straightforward language of the Treaty of Medicine Creek. Consequently, we hold that the manner of fishing permitted by any regulation for the conservation of the fishery must apply the same to Indians as to non-Indians. For example, if the prohibition of net fishing is necessary for the preservation of the fishery, it must be equally applied both to Indians and non-Indians in order to come within the ambit of the equal protection clause of the United States Constitution and the "equal protection" implication of

article 3 of the Treaty of Medicine Creek.

As previously mentioned, we feel that the juxaposition of Puyallup II beside Puyallup I demonstrates that the interpretation of the Treaty of Medicine Creek is an open question. For this reason, we have rendered the decision above as the first phase of our opinion. We recognize that the ultimate disposition of the treaty interpretation question is, however, vested with the United States Supreme Court. Moreover, we feel constrained by the express language on the face of Puyallup II, when considered independent of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore, pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and undertake a consideration of the allocation question expressly called for by that case. We must determine two issues. First, does the Indian Treaty right to a net fishery encompass only the natural run of steelhead, or does it extend to both the natural run and the hatchery run? Second, in terms of number of fish, how extensive is the right, and by what agency should this allocation be implemented? We shall address ourselves to these issues in the above order.

The artificial propagation of steelhead through a hatchery program on the Puyallup River did not commence until 1933. Therefore, just as the inexhaustible supply of fish at the time of the Treaty makes it inconceivable that the parties contemplated controls and limits on the fishery, it is also inconceivable that either the tribe or the government intended the Treaty to create any rights beyond the natural run. However, by examining the Treaty itself, we do find evidence which specifically relates to this issue. Even though the Treaty obviously makes no reference to artificially propagated steelhead, which were unknown at the time, it does set forth Indian rights with regard to artificially cultivated shellfish. There is an explicit proviso in article 3 that follows the language securing "the right of taking fish." The proviso states "[t]hat they [the Indians] shall not take shellfish from any beds staked or cultivated by citizens . . ." Treaty of Medicine Creek, (10 Stat. 1132, 1133). This plain language demonstrates that the rights secured to the tribe under the Treaty did not encompass artificially propagated sources of fish. Likewise, the Supreme Court indicated in Puyallup II that this result is correct. The majority opinion made no comment at all on the issue, but the concurring opinion of Mr. Justice White

stated that "the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." Puyallup II at 49.

We can find no reason to distinguish artificially cultivated shellfish from hatchery bred steelhead since the impact of the Treaty is to distinguish natural sources from artificial sources. To interpret the Treaty in any other fashion requires this Court to literally rewrite the terms of the Treaty and this we cannot do. See Confederated Bands of Ute Indians v. United States, supra; Northwestern Bands of Shoshone Indians v. United States, supra; and Choctaw Indians v. United States, supra.

The appellants contend that the opposite result must obtain due to changed circumstances such as civilization and pollution which are claimed to have caused depletion of the natural run. We disagree. The Treaty itself does not vest the Indians with any right in hatchery bred steelhead. Furthermore, the record does not demonstrate that the run has been depleted, but instead establishes that the artificially propagated run in fact augments the natural run since a hatchery bred steelhead loses it distinguishing characteristics upon returning to its native stream and henceforth is

classified as a natural run steelhead. Mr. Millenbach, the Chief of the Fisheries Management Division, testified as follows:

> Q. Now, does the Department of Game at no cost to the members of the Puyallup Tribe provide any services which enhance the Puyallup Tribe fishery? A. Well, the hatchery planting of smolt steelhead have contributed substantially to the net catch in the Puyallup River--the Indian net catch.

Mr. Heckman, who was called as an expert witness by the appellants and is a fishery biologist in charge of the Northwest Fisheries program, concurred in this opinion. The State thus established that the size of the natural run is increased yearly at no expense to the tribe. On the other hand, the appellants failed to introduce any evidence which substantiated their claim that the size of the natural run has in fact been depleted by the effect of modern society and, if so, the extent thereof. In conclusion, the appellants' contention that changed circumstances justify the sanctioning of a net fishery for hatchery bred steelhead

cannot be justified by the Treaty and is not supported by the record. Consequently, their argument must fail.

This result, which excludes hatchery bred fish from the Treaty right, is further supported by consideration of equity. The evidence below demonstrated that the steelhead prgram conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other "user fees."[3] It would be manifestly unfair to give one group of citizens a superior opportunity to enjoy a resource thusly provided while

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[3] The record clearly establishes that approximately 75 percent of the Department of Game's total revenue is derived from license fees. Moreover, only 4 percent of the total statewide expenditures by the Department of Game for the steelhead program are federally derived and this amount is attributable to matching funds under the Federal Anadromous Fish Act. It is our opinion, furthermore, that even if the State Department of Game's programs were totally federally funded, the Indians, absent specific conditions on such federal financing, would enjoy only those rights available to all state citizens to the resources thus provided.

denying other citizens, who provide the necessary funding, equal treatment. To allow the Indians to take hatchery fish by the use of nets would be subsidize them to the extent that other state citizens are paying for the hatchery program, while being limited solely to the much less effective hook-and-line method of fishing.[4] The Indian Treaty does not demand such a subsidy. See Puyallup II at 49 (White, J. concurring).

We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead other than those enjoyed by all citizens of the state. To hold otherwise would be to put the State to a Hobson's choice: either to continue the hatchery program and thus provide the Indians with additional steelhead guaranteed to be caught in their nets; or, to discontinue the program altogether and thus deny the benefits of such a resource program to all citizens of the state. Our holding in no way discriminates against the Indians because they, like all other citizens, are still free, as they always have been, to catch hatchery fish by the hook-and-line method as provided

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[4] We take judicial notice of the fact that one is far more likely to catch fish through the utilization of a net than with hook and line.

under the regulations of the State Department of Game.

We now direct our attention to the final issue. How many actual fish must be made available for that net fishery, and in what manner should this allocation be implemented?

The trial court decision below was, quite simply, an attempt to follow the Supreme Court's mandate in Puyallup II. The Supreme Court stated that the harvestable number of steelhead

> must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. . . .
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

(Italics ours.) Puyallup II at 48-49.

In order to do this, the trial court first determined, as we have, that the Indians' treaty right does not extend

to hatchery fish. It then found that the total steelhead run in the Puyallup River is composed of hatchery and natural fish in equal proportions, i.e., half the run is of natural origin and half is of hatchery origin. This finding is amply supported by the record. The record also supports the trial court's finding that a 50 percent escapement factor is required for the propagation of the natural run. Fifty percent of the natural run must be allowed to spawn in order to preserve the species. The trial court thus determined, in effect, that half the total annual steelhead run was natural and that it would be consistent with conservation (escapement) requirements to harvest half of the natural run.

After making the above determinations, the trial court then disposed of the main issue--the ultimate allocation between an Indian net fishery based on the Treaty and the sports fishery. Based on equitable factors, the trial court found that giving the Puyallup Treaty Indians 45 percent of the annual, natural steelhead run available for harvest would be a fair apportionment of the resource. Using estimates of the annual natural run size based on evidence relating to past steelhead runs, the trial court translated this percentage share into an exact number of fish, provided that the annual

run size continued to be of the same magnitude as the run size estimates before the court.

We believe that 45 percent of the harvestable natural run was equitable determination by the trial court in the exercise of its discretion. We cannot say from this record that such a determination was a manifest abuse of discretion. We therefore are not disposed to disturb this holding of the trial court. See Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 328, 525 P.2d 223 (1974); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The number of fish resulting from this apportionment will probably vary, of course, from year to year depending on the size of the natural run. The evidence in the record does not clearly establish a constant annual natural run size. On the contrary, the record indicates that the run size varies from year to year. The available estimates ranged from about 4,000 in the natural run to 56,000 in the total run. It is therefore obvious that the effect of this allocation decision will be determined each year by the size of the natural run. Thus it is necessary to decide who should be charged with the duty to make this annual allocation determination.

The Department of Game is the expert state agency charged with the duty of conserve the state's game resources, including the steelhead trout. See RCW 77.12.010,.040. The Supreme Court recognized in Puyallup II on page 48, that conservation decisions must be made by an expert. "Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species."

The 45 percent allocation figure of this decision applies to the harvestable amount of the annual, natural steelhead run, i.e., the amount available after conservation requirements are met. This allocation will necessarily depend on the Department of Game's estimate of the natural run size each year and its annual approximations as to the harvestable number of fish in the natural run. The Department's annual determination of the harvestable number of fish in the natural run, that is, its determination of the escapement requirement calculated to assure preservation of the species, will therefore determine the extent of the Indian net fishery required by federal treaty. Forty-five percent of the harvestable natural run is the extent of this treaty right. The Department of Game's annual determination will actually yield the number of fish that the Indians can catch using nets pursuant to the treaty

rights that, for purposes of this part of our opinion, we have assumed to exist.

By thus transforming the Indian right to a net fishery into an actual number of fish, it is possible to recognize this Indian Treaty right in light of conservation requirements and in the context of the total annual steelhead run. The total run consists of both hatchery and natural origin steelhead, while the treaty right only applies to the natural fish. It is possible to differentiate the two types of fish by certain markings, but they are substantially identical in size and all other characteristics. In practical terms there is no way to assure that only natural fish will be caught in the Indian nets.

All of the hatchery fish are harvestable because their escapement is not required to preserve the natural run. Thus, if the Indians take annually the actual number of their Treaty fish, the rest of the harvestable natural run, plus the rest of the hatchery run, will still be available to the sports fishery.[5] This

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[5] We emphasize again that the sports fishery is available to all state citizens--Indians are not preempted or precluded from participating in the hook-and-line fishery. The record shows that

method allocates the fish available, in light of conservation requirements, between the Indians' net fishery and the sports fishery--it assures that the Indian Treaty right is recognized.

To summarize, in phase one of the opinion, we hold that the Puyallup Tribe's right to a net fishery under the Treaty of Medicine Creek has never been directly adjudicated. It is our belief that the Treaty language "in common with" does not require that the Indians be exempted from State regulations. Rather, all that the Treaty requires is that the regulations apply equally to Indians and non-Indians. Because we feel bound to follow the express language on the face of Puyallup II, under phase two of our opinion, we hold that allocating 45 percent of the harvestable natural steelhead run each year to the Indian Treaty net fishery is a fair apportionment between Indian net fishing and sports fishing. The Department of Game has the responsibility to determine the extent of the harvestable natural run and to accommodate this

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Puyallup Indians have in fact fished in this manner. Indians enjoy the right to sports fishery on an equal basis with other citizens except that they are not required to purchase either a license or a punch card.

apportionment when establishing annual conservation regulations.

The judgment of the trial court is affirmed, except as to the modification thereof, wherein we direct the Department of Game to implement the annual allocation of steelhead consistent with this opinion. The first phase of our opinion is held in abeyance pending a final disposition of the Treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary.

/s/ Hunter, J.

WE CONCUR:

/s/ Wright, J.

/s/ Hamilton, J.

No. 43736

STAFFORD, C. J. (Concurring in the Result) -- I concur in the result reached by the majority as well as with the allocation of the steelhead trout run between the Indians and non-Indians. However, I reach the same result for different reasons.

I have reviewed Puyallup Tribe v. Department of Game, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1967) (hereinafter called Puyallup I) and Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (hereinafter called Puyallup II). The totality of the facts in Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 422 P.2d 754 (1967) and Department of Game v. Puyallup Tribe, Inc., 80 Wn.2d 561, 497 P.2d 171 (1972) when considered with Puyallup I and Puyallup II makes several things abundantly clear.

(1) Substantially all of the steelhead trout fishery occurs after their entrance into the Puyallup River; (2) that the case is concerned with the Puyallup Indians' use of set nets to catch steelhead in the Puyallup River; (3) that the only portion of the Puyallup River with which we are concerned flows through the Puyallup Indian reservation; (4) that

the present run of steelhead is made possible by the planting of steelhead; (5) that the planting program is financed in large part by the license fees paid by sports fishermen; and (6) that the central issue is the problem of accommodating the Puyallup Indians' net fishing and the non-Indian sports fishing with the conservation needs of the fishery.

It is equally clear the United States Supreme Court remanded the case for this state court to make a fair apportionment between Indian net fishing and non-Indian sports fishing under the above-related circumstances. The majority has accomplished this in an equitable manner.

I am convinced the Supreme Court did not direct this court to resolve the apportionment problem as an empty gesture. It is only logical to assume that once a formula resulting in fair distribution was achieved that the fair allocation should, insofar as possible, be maintained. If this assumption is not correct, then much of the language in Puyallup II is meaningless.

At first blush it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court.

In this regard see such cases as Menominee Tribe v. United States, 391 U.S. 404, 20 L. Ed. 2d 697, 88 S. Ct. 1705 (1968); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1932); Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974); Moore v. United States, 157 F.2d 760 (9th Cir. 1946); see also Seufert Bros. Co. v. United States, 249 U.S. 194, 63 L. Ed. 555, 39 S. Ct. 203 (1919); and United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905). On the other hand, it is only logical to assume the Supreme Court is equally aware of the above cited cases and had them in mind when the following broad language was used in Puyallup II at page 49:

> The aim is to accommodate the rights of Indians under the Treaty and the right of other people.
>
> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing

> should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

(Italics mine.)

When one considers the fragile nature of the fishery involved, as well as the State's physical and financial support of that resource, it is easy to understand the above quoted language. If the Supreme Court has not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce. Without question the Supreme Court did not intend to direct the State of Washington to perform a useless act.

For this reason, I am willing to accept the above quoted portion of Puyallup II at face value and concur in the

result reached by the majority.

/s/ Stafford, C.J.

I concur

/s/ Wright, J.

I concur

/s/ Utter, J.

I concur

/s/ Horowitz, J.

No. 43736

ROSELLINI, J. (concurring)--I concur in Justice Hunter's scholarly interpretation of the Medicine Creek Indian Treaty. This interpretation should dispose of the case. However, Justice Hunter felt compelled by the language found in Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973), to review the determination of the amount of catchable fish to be apportioned between the commercial Indian net fishery and the hook and line fishery of other citizens.

I believe that any apportionment of the fish run is contrary to the treaty and the Constitutions of the United States and Washington. Apportionment cannot be sustained by the law, or the fact in the case.

I find nothing in the language of the Treaty of Medicine Creek, 10 Stat. 1132, or in the Treaty of Point Elliott, 12 Stat. 927 (2 Indian Affairs Laws & Treaties 669 (1904)), that would even imply that fish runs were to be apportioned between the Indians and the White settlers. In fact, the treaties negate any such interpretation.

The exact language of the treaty in-

corporated as it was in other similar treaties contemporaneously negotiated with tribes makes it clear that Indians were not to be excluded from fishing at their accustomed grounds, but these rights were to be co-extensive only with the citizens of the territory. Thus, the Indians shall have all fishing rights that all the citizens have, and no Indian or non-Indian shall have any superior right.

Any other interpretation would distort the obvious meaning of the language.

Article 3 of the Treaty of Medicine Creek, as noted says:

> ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell

> fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

(Italics mine.) 10 Stat. 1133.

There is no word in any of the articles or in any other treaty to suggest that either the Indians or the White settlers intended that Indian tribes have a superior right to fish not equally available to citizens of the territory.

The treaty made with the Quinaielt, Quillehute and other tribes, 12 Stat. 971-72 (2 Indian Affairs Laws & Treaties 719-20 (1904)), employs identical language to the Treaty of Medicine Creek concerning the right of taking fish in common with all citizens of the territory.

The Treaty of Point Elliott, 12 Stat. 927, 928, with the Dwamish, Suquamish, and other tribes employs the same language used in the Treaty of Medicine Creek and the treaty with the Quinielt and Quillehute:

> ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

None of these treaties contains a hint that the Indians would acquire fishing rights superior to the citizens of the territory, or that the Indians would have a property right to 45 percent of the fish runs or any fraction of any fish run. The treaty gave the Indians and settlers a right to be held in common--the privilege or opportunity of catching fish.

Similarly, in the Treaty of Point no Point, 12 Stat. 933, 934, article 4 declares that

> [t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; . . .

It will be noted that there is a minor departure from the language of the three other treaties is describing the settlers as citizens of the United States rather than as citizens of the territory. One cannot find from this treaty or the three other treaties any language which gives exclusive off-reservation fishing rights or any apportionment of the fish runs.

What the treaties said is that Indians should not be barred from an opportunity to fish any more than the settlers were denied the right to do so.

A treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says

> [t]hat the exclusive right of taking fish

> in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.

It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of "exclusive rights" and "rights secured in common" with the citizens of the United States.

The precise distinction between exclsive and shared rights held in common with the citizens of the territory were made in a treaty with the Yakima Indian

Tribe. (See 12 Stat. 951).

A reading of all the treaties which were signed at about the time of the Medicine Creek Treaty in 1854 makes it clear that where an exclusive right was intended, and when a right to fish in common with the settlers or citizens was intended, language was used precisely to express the idea of exclusive rights and nonexclusive rights.

If it was intended to give 45 percent or any other portion of the fish runs to Indian or White citizens, language could have been used to express that intent. I find not even a hint that this was the intent of the treaties. I am sure that a treaty which would have given away any percentage of the fish runs would not have been ratified.

It must be remembered that the United States was inhabited by persons who left their homeland because of religious or political discrimination. They left also because of the economic discrimination. It must be remembered that game belonged to the King and to the estates of the lords. No one could hunt or fish without the consent of the King or the lords. In fact, poaching was a crime punishable by imprisonment or death. Thus, it would have been inconceivable that the citizens

or settlers of the United States would have allocation of fish or game.

In any event, article 6 of the United States Constitution reads:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; . . .

It will be seen that the United States Constitution, the laws made pursuant thereto, and the treaties are the supreme law. The laws enacted must pass the test of constitutionality. The treaties which are passed may not violate the constitution and may not deprive the citizen of any of his constitutional rights.

Treaties are part of the domestic law and where, as in this case, both parties to the treaties are citizens of the United States, the provisions of the constitution apply. Otherwise, the Executive and the Senate could by treaty which involves rights of its citizens disenfran-

chise a class of citizens. Any treaty right that gives Indians superior rights denies the equal protection of other "citizens" rights.

Let me further state why I think an apportionment of the fish run is legally incorrect.

It must be remembered that the steelhead fishery is financed by the purchase of fishing licenses and steelhead tags by the fishermen. None of the taxpayers' money is used for hatchery planting programs in restocking the rivers, except a very small amount furnished by the federal government.

Without the hatchery-reared steelhead planted in the rivers, there would not be any fish to catch and there would not be a natural run. My conclusions are based upon the following facts which logically follow from the planting statistics, and take into account the misconception of what is natural and what is native steelhead.

The record disclosed that natural or native steelhead is arbitrarily defined as any steelhead that does not have any hatchery marking. The record disclosed that the progeny of the hatchery-planted steelhead under this definition is

arbitrarily counted as a natural run of steelhead.

The following chart which sets forth the planting and catch of steelhead illustrates to my mind that without the large planting, the return of the steelhead would be minimal.

PUYALLUP RIVER SYSTEM STEELHEAD PLANTS AND CATCH

Winter Season	Cycle Plant[1].	Indian[2].	Sports	Total
1947-48			1,937	1,937
49			4,644	4,644
50	52,000		7,443	7,443
51	18,000		6,037	6,037
52	33,000		15,660	15,660
53	66,000	104	14,566	15,670
54	74,000	2,671	19,296	21,967
55	70,000	2,029	14,490	16,519
56	47,000	2,308	20,348	22,656
57	70,000	2,554	14,184	16,738
58	57,000	2,960	8,794	11,754
59	58,000	2,740	7,528	10,268
60	55,000	4,506	9,547	13,053
61	63,000	2,917	4,684	7,601
62	79,000	2,629	10,419	13,048
63	57,000	1,834	11,717	13,551

Winter Season	Cycle Plant[1].	Indian[2].	Sports	Total
1963-64	65,000		15,942	15,942
65	63,000		6,914	6,914
66	93,000		18,761	18,761
67	65,000		15,971	15,971
68	100,000		16,971	16,971
69	67,000		11,602	11,602
70	98,000	500	6,738	7,238
71	124,000	1,500	12,101	13,601
72	123,000		9,648	9,648
73	122,000	317	4,015	4,332

Winter Season	Cycle Plant[1].	Indian[2].	Sports	Total
1973-74	107,000	1,105 [2,500-3,000]*	[4,472]	
75	75,000			
76	68,000			

1. Cycle plants made 2 years prior to winter season, i.e., cycle plants of 52,000 (1950) was made in 1948 and contributed to the catch of 7,443 fish in 1949-50 winter season.

2. Data represents White River and Puyallup Indian catch as available and is incomplete.

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* The numbers appearing in brackets are not part of the exhibit. An explanation for the numbers is found on page 25 of this brief.

Respondent's Brief, Appendix; Exhibit 74-2.

Without the massive infusion of the hatchery fish, the steelhead runs subject to the net fishery would have been depleted.

The evil of permitting net fishing for steelhead is that it will devastate the run. The net fishery on the Skagit River exceeds 57 nets. Many of the nets are placed alternatively from one side of the river to the center of the river. The nets on the opposite side are placed alternatively so that they intersect the nets placed on the other side of the river. The effect is to block all upstream fish.

Steelhead are different from salmon, which spawn and die. Steelhead will spawn and live to return to spawn again. They are in a very poor condition after spawning and are regarded as unfit to eat. The nets not only take all the steelhead going upstream to spawn, but will catch all of the steelhead which have already spawned and are returning downstream.

Runs of steelhead enter rivers at different times during the season. It is possible to deplete the run at a certain period. It is urged that proper regulation can control this situation; however, the record is replete with evidence that net fishery cannot be successfully regulated.

The inefficiency of the enforcement of the regulation is shown by the fact that in December 1975, the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 4,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish.

Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource.

The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and, further, the manner of fishing itself must not be destructive. The Department of Game, in order to conserve the steelhead runs, has placed limitations on the manner of fishing and the catch limit of steelhead. Non-Indians must fish with line and hook (as opposed to the Indian net fishing), and the non-Indian is limited to the maximum of two per day and no more than four in possession, and a maximun of 30 per season.

This case is entitled "Department of Game v. Puyallup Tribe, Inc." It suggests that the tribe itself is benefiting from the net fishery. However, the record shows that there are approximately 850 members of the Puyallup Tribe, of which 320 are over the age of 21. Twenty Puyallup Tribe fishermen fish essentially full time, 20 part-time, and an additional 20 fish only occasionally. The commerical value of steelhead caught by the Indians is approximately $10 a fish. The individual fishermen keep the proceeds of their fish sales, and this money is not shared with the tribe.

How can an apportionment of the catch, as found by the court, of 45 percent of the fish runs be equitable, fair, or conscionable when 60 Indians are allocated such a large proportion and thousands of non-Indians must share the remainder?

Under the Treaty of Medicine Creek, the only guarantee to the Indians is a right to the opportunity to fish. The treaty did not guarantee them any portion of the fish. Even if apportionment is permitted, should not the fish be divided more equitably between the non-Indian sportsmen and the Indians?

It must be remembered that before the incredible doctrine of apportionment

was announced, the Indians had the same right to fish, and in the same manner as non-Indians. The treaty Indians could fish as sportsmen or as commercial fishermen, whether it was by troller, gillnetting, or set net.

Heretofore, all citizens, whether Indians or non-Indians, were treated as equals. Now the courts have decided the rights of other citizens are inferior to Indian rights. I cannot subscribe to such a doctrine. I would hold that the treaty does not permit or contemplate any allocation of the fish, but rather the opportunity to fish and catch fish in the same manner as any citizen. I would take cognizance of the fact that fishing with fixed nets will devastate the fish runs and jeopardize one of the great natural resources of this state--a result which could never have been intended by any party to these treaties.

/s/ Rosellini, J.

I concur

/s/ Brachtenbach, J.

THE SUPREME COURT
OF
WASHINGTON

THE DEPARTMENT OF GAME, ET AL, Respondents,	)	
PUYALLUP TRIBE, INC., ET AL, Appellants	)	No. 43736
	)	ORDER DENYING PETITION FOR REHEARING

The Court having decided by a vote of seven to one that the appellants' petition for rehearing should be denied,

It is ordered that the petition be and it hereby is denied.

Dated this 25th day of June, 1976.

/s/
Chief Justice

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JUL 1 1976

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,
NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,
Intervenor-Respondents,

WESTERN STEELHEADERS, INC.,
Intervenor-Respondents,

v.

PUYALLUP TRIBE, INC., et al.,
Appellants.

REMITTITUR

No. 43736

Pierce County No. 158069

The State of Washington to: The Superior Court of the State of Washington

in an for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 8, 19 76, became the final judgment of this court in the above entitled case on June 25, 19 76. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Costs will be taxed by supplemental judgment following the Court's decision on the motion taken under advisement by the Court on June 4, 1976.

The petition for rehearing was denied by Order dated June 25, 1976.

cc: Counsel (per attached list)
Reporter of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 28th day of June, A. D. 19 76

JOHN J. CHAMPAGNE
Clerk of the Supreme Court, State of Washington
By: Reginald N. Shriver, Deputy

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SUP-007 (10-75)